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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

SHELLEY McDANIEL, Plaintiff and Appellant, v. ST. FRANCIS MEDICAL CENTER et al., Defendants and Respondents.	B230685 (Los Angeles County Super. Ct. No. TC024099)

APPEAL from a judgment of the Superior Court of Los Angeles County. William P. Barry, Judge. Affirmed.

Ellis Law Corporation and Andrew L. Ellis for Plaintiff and Appellant.

La Follette, Johnson, De Hass, Fesler & Ames, Louis H. De Haas and David J. Ozeran for Defendant and Respondent St. Francis Medical Center.

Ryan, Datomi & Mosely, Richard J. Ryan and Dawn Cushman for Defendant and Respondent Gordon C. Fraser, M.D.

Shelley McDaniel appeals from the dismissal of her complaint for negligent infliction of emotional distress as a result of witnessing an injury to her nephew during his birth. McDaniel's claim was dismissed below for lack of standing. We affirm.

FACTS

Kim Charisse McDaniel Farr is McDaniel's sister. She asked McDaniel to be in the delivery room with her during the birth of her son Kenneth Moore on April 17, 2009. Doctors Gordon Fraser and Wilbur Troutman performed a Cesarean section at St. Francis Medical Center (St. Francis). During the procedure, the baby's scalp was cut. McDaniel saw a large portion of the baby's scalp hanging from his skull and saw a large amount of blood. McDaniel heard a doctor shout, "I didn't cut that deep!" One of the operating staff also exclaimed, "Oh my god! What is that? It looks like a big laceration." The 11.5 centimeter laceration on the baby's skull required over 30 sutures, skin glue and extensive hospitalization.

In a complaint filed on March 12, 2010, against the hospital and the surgeons, McDaniel alleged she suffered serious emotional distress as a result of what she saw at her nephew's birth. McDaniel's sister and nephew also alleged causes of action against the defendants in the same complaint. Their claims were not dismissed and are not the subject of this appeal. St. Francis and Dr. Fraser demurred to McDaniel's cause of action on the ground that she lacked standing because she was not a close relative of the baby nor did she live with him. The trial court sustained the demurrer and McDaniel was dismissed from the matter. She timely appealed.

DISCUSSION

The sole issue on appeal is whether an aunt should be allowed to recover for negligent infliction of emotional distress (NIED) after witnessing an injury to her nephew during childbirth. We find she should not.

The leading case addressing the issue of NIED recovery is *Thing v. La Chusa* (1989) 48 Cal.3d 644 (*Thing*). In *Thing*, the Supreme Court was presented with the narrow question of whether a mother who did not witness the accident which injured her son could nevertheless recover for NIED as a result of the emotional distress she suffered

when she arrived at the scene of the accident. (*Id.* at pp. 646-647.) In answering that question, the court refined the boundaries within which a NIED claim lies. The *Thing* court held that NIED damages are recoverable only if the plaintiff: (1) was closely related to the injury victim, (2) was present at the scene of the injury-producing event at the time it occurs and was then aware that it was causing injury to the victim, and (3) as a result suffered emotional distress beyond that which would be anticipated in a disinterested witness. (*Id.* at pp. 667-668.) Our focus in this case is on the first element—whether McDaniel is sufficiently closely related to the baby to recover under NIED. The *Thing* court provides some guidance on the issue, stating in a footnote that "[i]n most cases no justification exists for permitting recovery for NIED by persons who are only distantly related to the injury victim. Absent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim." (*Id.* at p. 668, fn. 10.)

While acknowledging it was drawing arbitrary lines as to who could recover for NIED, the court explained that "[t]he number of family members who might seek damages on the basis of a single incident could unreasonably enlarge the defendant's burden." (*Thing, supra,* at p. 665.) "Emotional distress is an intangible condition experienced by most persons, even absent negligence, at some time during their lives. Close relatives suffer serious, even debilitating, emotional reactions to the injury, death, serious illness, and evident suffering of loved ones. These reactions occur regardless of the cause of the loved one's illness, injury, or death. That relatives will have severe emotional distress is an unavoidable aspect of the 'human condition.' The emotional distress for which monetary damages may be recovered, however, ought not to be that form of acute emotional distress or the transient emotional reaction to the occasional gruesome or horrible incident to which every person may potentially be exposed in an industrial and sometimes violent society . . . The overwhelming majority of 'emotional distress' which we endure, therefore, is not compensable. [¶] . . . In identifying those persons and the circumstances in which the defendant will be held to redress the injury, it is appropriate to restrict recovery to those persons who will suffer an emotional impact

beyond the impact that can be anticipated whenever one learns that a relative is injured, or dies, or the emotion felt by a 'disinterested' witness. The class of potential plaintiffs should be limited to those who because of their relationship suffer the greatest emotional distress. When the right to recover is limited in this manner, the liability bears a reasonable relationship to the culpability of the negligent defendant." (*Id.* at pp. 666-667.)

As explained in *Thing*, someone who is not an immediate relative or does not reside with the victim is allowed to recover under NIED only under exceptional circumstances. (*Rodriguez v. Kirchhoefel* (2005) 128 Cal.App.4th 427.) McDaniel concedes she does not reside with her nephew but contends exceptional circumstances exist in this case to allow her recovery under NIED. The parties agree that no cases define "exceptional circumstances" and *Thing* itself fails to provide any guidance.

The court in *Moon v Guardian Postacute Services, Inc.* (2002) 95 Cal.App.4th 1005 (*Moon*) addressed this issue. In *Moon*, a son-in-law sought damages for NIED after he saw his mother-in-law abused at her nursing facility. He alleged he had a close relationship with his mother-in-law and she lived with them for "a period of time" prior to her admission into the nursing facility. (*Id.* at p. 1008.) The trial court dismissed his claim for lack of standing and the Court of Appeal affirmed. (*Id*. at p. 1007.) The appellate court read *Thing* closely and found it intended to limit NIED claims. The court held the son-in-law's allegations of a loving and close relationship with his mother-in-law were insufficient to meet the exceptional circumstances requirement under *Thing*. Although he alleged that his mother-in-law stayed with them for a period of time, that he took her to her weekly doctor's appointment and that he arranged for her to be admitted into the nursing facility, the court found that "[n]one of the facts alleged . . . evinces an act out of the ordinary for a son-in-law." (*Id.* at p. 1013.) The *Moon* court stated that it believed an NIED claim based on exceptional circumstances would have to be grounded on issues of public policy, noting that it may be persuaded to find exceptional circumstances exist if, for example, there were no relatives to recover under NIED and

the defendant was relieved of all liability. That was not the case in *Moon* since the son-in-law's wife had a valid NIED claim. (*Ibid*.)

According to McDaniel, an exceptionally close relationship is demonstrated here because she was the only relative present in the delivery room during the baby's birth. She was asked and agreed to participate in an extremely intimate event. She claims a finding of exceptional circumstances was warranted based on public policy reasons: liability was not based on fortuitous circumstances, there was no unreasonable burden on society and the defendant, and the court was not required to make invasive inquiries into the emotional attachment between McDaniel and her nephew. McDaniel asserts that "[i]f the circle of liability circumscribed by *Thing* must include relatives who reside in the same household—on the basis that they will suffer the most emotional harm in witnessing injury to a loved relative—it should also include a relative such as [her] who has made the serious decision to be in the delivery room during the birth of a loved one and has witnessed injury to her loved one."

While we sympathize with McDaniel, she has not alleged she "suffer[ed] an emotional impact beyond the impact that can be anticipated whenever one learns that a relative is injured, or dies[.]" As in *Moon,* McDaniel does not allege facts which evince any act or relationship that is out of the ordinary for an aunt. That she was asked to be present in the delivery room demonstrates a close and loving relationship with her sister, but not with her newly-born nephew. There are no allegations, for example, that McDaniel actively participated in pre-natal care or contributed in some specific way to her nephew's well-being rather than her sister's.[1] It is also important to note that, as in *Moon*, it is not the case that by dismissing McDaniel's claim, the defendants are completely absolved of all liability. The claims of negligence by McDaniel's sister and nephew have not been dismissed. For her part, McDaniel has not alleged any facts which suggest exceptional circumstances exist in this matter.

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[1] By so stating, we do not find or imply that such circumstances are "exceptional."

We also decline to find the trial court abused its discretion by sustaining the demurrer without leave to amend. In her briefing, McDaniel presented us with no additional allegations which would cure the defect in her pleading. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

DISPOSITION

The judgment is affirmed. Each party to bear its own costs on appeal.

BIGELOW, P. J.

We concur:

FLIER, J.

SORTINO, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.